The influence of constitutional considerations on freedom of testation in South African law

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1. Introduction

1.1 *Freedom of testation as concept*

“...the most obvious manifestation of private autonomy in the sphere of the law of succession.”

1.2 *Point of departure in South African law*
“Roman–Dutch law recognizes as a matter of public interest, transcending the private interest of beneficiaries under a will, that effect be given to the wishes of a testator (D 29.3.5), or, as Voet 35.1.12 states [it], the interests of the testator and the public interest demand that effect should be given to a testator’s last wishes”.
1.3 Standard (existing) restrictions on freedom of testation

- common law
- legislation

2. The influence of constitutional considerations on freedom of testation
2.1 The basic questions

• does the Constitution guarantee the institution of private succession?
• if so, what is the implication for freedom of testation?
• how does s 9 of the Constitution (the “equality clause”) affect freedom of testation?
2.2 Brief comparative excursion: German law

- art 14(1) Grundgesetz:

  “Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.”

  “Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.”
• Implications
  a. succession as private institution is guaranteed ("Erbrechtsgarantie")
  b. principle of freedom of testation is guaranteed (implicit in the guarantee of ownership ("Eigentum"))

(Freedom of testation as an element ("Teilaspekt") of the right to dispose of one’s property: Leipold *Erbrecht*)
BVerfGE 67, 329 (341):

“…die Testierfreiheit ist als Verfügungsbefugnis des Eigentümers über den Tod hinaus eng mit der Garantie des Eigentums verknüpft…”

c. restrictions
2.3 Post–Constitutional South African Law: s 25(1) of the Constitution

- s 25(1) of the Constitution, 1996

“No one may be deprived of property except in terms of law of general implication, and no law may permit arbitrary deprivation of property.”
three cases

*Minister of Education v Syfrets Trust*
2006 (4) SA 205 (C)

a. **facts:**

“…of European descent only…and persons of Jewish descent and females are not eligible…”
b. *grounds for deletion contended for:*

1. s 13 Trust Property Control Act 57 of 1988
2. direct application of the Constitution (especially s 9)
3. the common law
c. the “property” arguments:

1. “...freedom of testation forms an integral part of a person’s right to property, and must therefore be taken to be protected in terms of s 25.”

   Court: “...prepared...to accept the correctness of such view, without making any firm finding to that effect.” (par [18])
2. deleting the contested provisions would thus constitute an “arbitrary deprivation of property” (s 25(1))

Court:
- no “deprivation”
- not “arbitrary”
- and in any event: right to freedom of testation not absolute (paras [19] – [22])
d. finding:

1. must look at *boni mores* (public policy) through lens of Constitution
2. provisions constitute unfair discrimination = against public policy – must be deleted
3. weighing up of competing constitutional rights
4. NB: qualification
Curators, Emma Smith Educational Fund v University of Kwazulu-Natal and Others 2010 (6) SA 518 (SCA)

a. facts:
“...higher education of European girls born of British South African or Dutch South African parents, who have been resident in Durban...”

b. ground for deletion contended for:
1. s 13 Trust Property Control Act 57 of 1988
c. the “property” argument:

1. “…the amendment of the will would interfere with freedom of testation which…is not only a fundamental principle of the law of succession but also part of the fundamental right not to be deprived of property in an unjustifiable fashion (s 25(1).” (par [42])
Court: “The constitutional imperative to remove racially restrictive clauses that conflict with public policy…must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past.” (par [42])
d. finding:

1. removal of “European” (white), but not “girls” or “Durban”
2. NB: qualification (par [41])

(But see: *In re Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC) – deletion of “boys”)

In re BOE Trust Ltd and Others NNO
2013 (3) SA 236 (SCA)/(2009 (6) SA 470 (WCC)

a. facts:
“...white South African students...planning to complete their studies with a doctorate degree at a University in Europe or in Britain...[but who] must return to South Africa...”
b. court’s pronouncement on “property” argument

“In my opinion, it is clear that the right to property (s 25(1) includes the right to give enforceable directions as to its disposal on the death of the owner.”

(WCC par [9])
“The view that s 25 protects a person’s right to dispose of their assets as they wish, upon their death, was at least accepted (but not decided) in *Minister Education v Syfrets*…. This view is, to my mind, well held. For if the contrary were to obtain, a person’s death would mean that the courts, and the state, would be able to infringe a person’s property rights after he or she has passed away, unbounded by the strictures which obtain while that person is still alive.” (SCA par [26])
3. Concluding remarks